

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:	§	
	§	
FRETZ CONSTRUCTION COMPANY,	§	Case No. 17-33832
	§	
Debtor.	§	<u>HEARING SET:</u>
	§	November 8, 2019 at 9:00 a.m.

**SECOND MOTION OF FIRST COLONY CHURCH OF CHRIST FOR
RELIEF FROM § 362 AUTOMATIC STAY REGARDING
CONSTRUCTION DEFECT CLAIMS**

THIS IS A MOTION FOR RELIEF FROM THE AUTOMATIC STAY. IF IT IS GRANTED, THE MOVANT MAY ACT OUTSIDE OF THE BANKRUPTCY PROCESS. IF YOU DO NOT WANT THE STAY LIFTED, IMMEDIATELY CONTACT THE MOVING PARTY TO SETTLE. IF YOU CANNOT SETTLE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY AT LEAST 7 DAYS BEFORE THE HEARING. IF YOU CANNOT SETTLE, YOU MUST ATTEND THE HEARING. EVIDENCE MAY BE OFFERED AT THE HEARING AND THE COURT MAY RULE.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

THERE WILL BE A HEARING ON THIS MATTER ON FRIDAY, NOVEMBER 8, 2019 AT 9:00 A.M. IN COURTROOM 404 (JUDGE ISGUR), 515 RUSK STREET, 4TH FLOOR, HOUSTON, TEXAS.

TO THE HONORABLE MARVIN ISGUR, U.S. BANKRUPTCY JUDGE:

First Colony Church of Christ ("FCCC"), creditor and party in interest, files this *Second Motion of First Colony Church of Christ for Relief from § 362 Automatic Stay Regarding Construction Defect Claims* (the "Motion to Lift Stay") and in support thereof would show the Court the following.

JURISDICTION, VENUE, FINAL ORDER AUTHORITY

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334 and 11 U.S.C. § 362.
2. Venue is proper in this court.
3. This Court may enter a final order as to this core proceeding and contested matter.

FACTUAL BACKGROUND

4. On July 6, 2017 (the “Petition Date”), Fretz Construction Company (“Fretz” or the “Debtor”) filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C. §101 et seq. (the “Code”).
5. Rodney Tow is the duly appointed Chapter 7 Trustee (the “Trustee”).
6. In 2007-2009, Fretz performed a construction project (the “Project”) for FCCC pursuant to a certain construction contract entered into between FCCC and Fretz on or about December 10, 2007 (the “Contract”).
7. Beginning in 2017 and prior to the Petition Date, FCCC began to discover water intrusion and/or other issues in portions of the structure(s) upon which Fretz performed work and/or provided materials under the Contract, which intrusion and/or other issues constitute claims within the scope of the guaranty provisions of the Contract and/or giving rise to other potential claims against Fretz (the “Construction Defect Claims”).
8. It appears also that one or more subcontractors to Fretz should be liable to Fretz and/or FCCC.
9. The bankruptcy estate in this case possesses insufficient assets to provide even a de minimis recovery to FCCC on account of the Construction Defect Claims.

10. In connection with the Contract and the Project, Fretz obtained various insurance coverages for the benefit of Fretz and/or FCCC as shown in the insurance certificate provided with the Contract (collectively, the “Insurance Policies”).

11. In order for FCCC to potentially obtain any recovery from and/or on account of the Insurance Policies and/or other liable parties related to the Construction Defect Claims, it is necessary under applicable Texas law for FCCC to commence an action directly against Fretz, and thereby the Trustee, that is adversarial in nature and to provide the relevant insurers and/or the relevant subcontractors an opportunity to defend against the Construction Defect Claims in such action.

12. Accordingly, FCCC seeks relief from the Code § 362(a) stay so that FCCC may commence an action in state court against the Trustee as the representative of Fretz and any other defendants that FCCC deems necessary.

13. Upon commencement of such action, FCCC anticipates that the Trustee, with respect to the Construction Defect Claims made against Fretz and possibly other defendants, will notify the relevant insurers under the Insurance Policies and request a defense of and/or coverage with respect to the Construction Defect Claims.

14. This is the second motion for stay relief prosecuted by FCCC. The prior stay relief order (Docket No. 51) did not expressly permit a direct action against Fretz and/or the Trustee.

RELIEF REQUESTED

15. FCCC respectfully requests that the Court lift, annul, and terminate the automatic stay of Code § 362(a) so that FCCC immediately may commence an action against Fretz and/or the Trustee in order to assert and liquidate all Construction Defect Claims against Fretz;

provided, however, that FCCC shall limit any recovery from such litigation to any recovery that might be obtained by Fretz and/or the Trustee from any insurers for the benefit of FCCC.

16. FCCC respectfully requests that the Court terminate the 14-day of Bankruptcy Rule 4001(a)(3) and provide that relief from the Code § 362(a) stay is immediately effective.

17. A proposed order is submitted with this Motion to Lift Stay and is incorporated by reference herein.

BASIS OF RELIEF

18. Pursuant to Code § 362(d)(1), cause exists to immediately terminate the § 362(a) automatic stay.

19. Cause exists to grant relief from the Code § 362(a) stay so that FCCC may pursue the Construction Defect Claims against Fretz and/or the Trustee.

20. Under Texas law, it is necessary for FCCC to commence an action against Fretz, and thereby the Trustee, in order to liquidate the Construction Defect Claims in a proceeding that is adversarial in nature. *See e.g., State Farm Fire & Casualty Company v. Gandy*, 925 S.W.2d 696 (Tex. 1996).

21. Moreover, under the current application of Texas law, a proof of claim that is deemed allowed by the lack of any objection under Code §502(a), such as the proof of claim filed by FCCC in this case (*see* Claim No. 24, as amended), as an objective matter likely is insufficient for FCCC to trigger coverage for Fretz, the Trustee, and/or FCCC in the absence of a civil action to adjudicate liability.¹

¹ FCCC expressly does not waive any fact, claim, issue, right, remedy, or defense with respect to the ultimate effect of the deemed allowed status of its proof of claim.

22. Relief from the Code § 362(a) stay also is consistent with the *Sonnax* factors, which factors bankruptcy courts typically consider to evaluate whether to permit stay relief so that the prosecution of claims may proceed outside of the bankruptcy forum.²

- (a) Stay relief will result in a complete resolution of the Construction Defect Claims.
- (b) Pursuit of the Construction Defect Claims against Fretz and/or the Trustee will not unduly interfere with the administration of this case.
- (c) Any state court proceeding involving the Construction Defect Claims could involve Fretz as a fiduciary, but will not impact the estate subject to the limitations to be provided in the order on this Motion.
- (d) The specialized tribunal factor is not applicable.
- (e) The Debtor's insurers have not assumed full responsibility, but it is the purpose of this action to put them on notice and to provide a defense to Fretz and/or the Trustee.
- (f) The contemplated action to liquidate the Construction Defect Claims would involve the Trustee but would also involve third parties, such as the affected subcontractors.
- (g) Any state court litigation to liquidate the Construction Defect Claims will not prejudice the creditors in this case. As stated above, any recoveries obtained by FCCC in the contemplated litigation will be limited to any amounts Fretz and/or the Trustee recover from the insurers.
- (h) No judgment that might be obtained by FCCC would be subject to equitable subordination, and/or this factor is not applicable.
- (i) Any success in the pursuit of the Construction Defect Claims would not result in a judicial lien to that would require avoidance by the Debtor.

² See *In re Xenon Anesthesia of Texas, PLLC*, 510 BR 106 (Bankr.S.D.Texas 2014), citing *Sonnax Industries, Inc.*, 907 F.2d 1280 (2nd Cir.1990) (1) whether the relief will result in a partial or complete resolution of the issues; 2) lack of any connection with or interference with the bankruptcy case; 3) whether the other proceeding involves Debtor as a fiduciary; 4) whether a specialized tribunal has been established to hear the particular cause of action; 5) whether the debtor's insurer has assumed full responsibility; 6) whether the action primarily involves third parties; 7) whether litigation in the other forum would prejudice the interests of other creditors; 8) whether the judgment claim arising from the other action is subject to equitable subordination; 9) whether movant's success would result in a judicial lien avoidable by the debtor; 10) interests of judicial economy and the expeditious and economical resolution of litigation; 11) whether the proceedings have progressed to the point that parties are ready for trial; and 12) impact of the stay on the parties and the balance of harm.)

- (j) Stay relief would promote judicial economy and the expeditious and economical resolution of (potential) litigation.
- (k) No proceedings against Fretz and/or the Trustee regarding the Construction Defect Claims have commenced to date.
- (l) No other parties will be harmed by the relief sought by FCCC.

NOTICE

23. Notice of this Motion is provided in accordance with Fed. R. Bankr. P. 4001(a)(1) and LBR 4001-1(a)(d). No third parties are known to hold an interest in the Insurance Policies.³

24. Notice of this Motion also is provided to the insurers under the Insurance Policies and/or counsel involved to date.

CONCLUSION AND PRAYER

WHEREFORE, First Colony Church of Christ, creditor and party in interest, respectfully requests that the Court lift, annul, and terminate the automatic stay of 11 U.S.C. § 362(a) so that FCCC immediately may pursue all Construction Defect Claims against Fretz Construction Company and/or Rodney Tow, Chapter 7 Trustee as set forth above, and that the Court terminate the 14-day of Bankruptcy Rule 4001(a)(3) and provide that relief from the § 362(a) stay is immediately effective. Movant respectfully requests such other and further relief to which Movant is entitled at law or in equity.

³ Schedule D (Docket No. 21) reports no secured creditors.

Dated: October 23, 2019

Respectfully submitted:

WEYCER, KAPLAN, PULASKI & ZUBER, P.C.

By: /s/ Jeff Carruth

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing item on October 23, 2019 was served (i) by ECF notice to all registered users who have appeared in this case to date and which are listed below and (ii) by regular mail to the following persons in the address lists shown below.

/s/ Jeff Carruth

Jeff Carruth

CERTIFICATE OF CONFERENCE

The undersigned previously corresponded with Rodney Tow, Chapter 7 Trustee, and the relief sought above is not believed to be opposed by the Trustee.

/s/ Jeff Carruth

Jeff Carruth

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17-33832 Fretz Construction Company
Case type: bk **Chapter:** 7 **Asset:** Yes **Vol:** v **Judge:** Marvin Isgur
Date filed: 06/20/2017 **Date of last filing:** 08/15/2019

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:

FRETZ CONSTRUCTION COMPANY,

Debtor.

§
§
§
§
§

Case No. 17-33832

**ORDER GRANTING SECOND MOTION OF FIRST COLONY CHURCH
OF CHRIST FOR RELIEF FROM § 362 AUTOMATIC STAY
REGARDING CONSTRUCTION DEFECT CLAIMS (RE: DOCKET NO.**

___)

On this date the Court considered the *Second Motion of First Colony Church of Christ for Relief from § 362 Automatic Stay Regarding Construction Defect Claims* (Docket No. ___) (the “Motion to Lift Stay”) which was filed herein by First Colony Church of Christ (“FCCC”) on October 23, 2019. The Motion to Lift Stay contained the necessary notices and, according to the certificate of service therein, was served upon all parties entitled to notice. Based upon the record before the Court, the Court finds and concludes that cause exists under 11 U.S.C. § 362(d)(1) to immediately terminate the automatic stay as set forth herein.

IT IS THEREFORE ORDERED THAT:

1. The Motion to Lift Stay is granted as set forth herein.
2. Capitalized terms not defined herein shall have the same meaning as ascribed to such terms in the Motion.
3. The automatic stay of 11 U.S.C. § 362(a) is hereby lifted, annulled, and terminated with respect to FCCC pursuing all Construction Defect Claims against Fretz Construction Company and/or Rodney Tow, Chapter 7 Trustee; provided, however, that FCCC shall limit any recovery from such litigation to any recovery that might be obtained by Fretz and/or the Trustee from any insurers for the benefit of FCCC.
4. The 14-day of Bankruptcy Rule 4001(a)(3) is terminated, and the relief provided in this order is immediately effective.

DATED: _____

THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE